IN THE

Supreme Court of the United States

October Term, 1903.

HANNAH O'CALLAGHAN and EDWARD CORCORAN, *Appellees and Petitioners,*

v.

TERENCE O'BRIEN, as Administrator of the Estate of John Sullivan, deceased, and MARIE CARRAN, *Appellants and Respondents.*

No. [illegible]

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS

We desire to reply to the briefs of counsel for the respondent, Marie Carrau, filed in opposition to the application for *certiorari* in the above entitled suit.

We will first ask the attention of the Court to a few errors in the briefs of counsel for respondent. Throughout their briefs they repeatedly refer to the "Probate Court," as though, in the State of Washington there were a separate Probate Court. They also speak of the department of the Superior Court exercising probate jurisdiction, as though there were a department of that Court

recognized by law as being vested with probate jurisdiction. There is no foundation for these assumptions. In the State of Washington, the Superior Court is created by the constitution of the State. Section 6, Article IV, of the State Constitution, is as follows:

"The Superior Court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, * * * of all matters of probate * * * the Superior Court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

Section 10, Article XXVII of the state constitution is as follows:

"When the State is admitted into the Union, and the Superior Courts in the respective counties organized, the books, records, papers and proceedings of the Probate Court in each county, and all causes and matters of administration pending therein shall, upon the expiration of the terms of office of the Probate Judges on the second Monday in January, 1891, pass into the jurisdiction and the possession of the Superior Court of the same county created by this constitution, and the said Court shall proceed to final judgment or decree, order or other determination in the several matters and causes as the territorial Probate Court might have done if this constitution had not been adopted. And until the expiration of the term of office of the Probate Judges, such Probate Judges shall perform the duties now imposed upon them by the laws of the territory. The Superior Courts shall have appellate and revisory jurisdiction over the decisions of the Probate Courts as now provided by law, until such latter courts expire by limitation."

"The constitution does not make the Superior Courts Probate Courts. On the contrary, it vests the Superior Courts with jurisdiction 'of all matters of probate,' hence the Court is not shorn of its general powers simply because the case before it may be one which was cognizable formerly in a court of probate. It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. The Statute therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such power is in existence."

Reformed Presbyterian Church vs. McMillan, 31 Wash., 643.

"When the constitution was adopted, the Superior Court was vested with general jurisdiction, such as was exercised by the territorial district courts, and also with jurisdiction in probate matters, and the Probate Court, as an independent tribunal, was abolished."

Ball et al vs. Clothier et al, 75 Pacific, 1099 (34 Wash. p.—).

"In this state we have no Probate Court, properly speaking, as distinguished from the courts that entertain jurisdiction of other matters * * * matters pertaining to probate are referred to what is called 'Probate procedure' as distinguished from what is denominated 'Civil' or 'Criminal' procedure, but when the court sitting in a probate proceeding discovers in a petition a statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder, when an appearance has been made thereto, and then proceed to try it in a proper manner *as any other civil cause*."

Filley vs. Murphy, 30 Wash., 1, 5.

"It is not a law court, nor an equity court, nor a Probate Court, but it is all the time the Superior Court of general jurisdiction, empowered to try *all these differently termed causes under the title of a civil action*, and when it has once acquired jurisdiction *of that civil action*, it may proceed, in an orderly way, to determine equitable, legal or probate controversies."

Browder vs. Phinney, 30 Wash. 74.

"*Proceedings to contest a will are in their nature equitable* and trial by jury of issues of fact therein is not a matter of right."

Clayson vs. Clayson, 26 Wash., 253.

It appears, therefore, that the constitution of the State, Section 6, Article IV, vested the Superior Court with original jurisdiction in all cases in equity, and in all cases at law in which the title or possession of real property was involved, and also of all matters of probate.

In the case of Reformed Presbyterian Church vs. Mc Millan, 31 Wash., 643, the question presented to the Supreme Court of the state was whether the Superior Court in a probate proceeding had jurisdiction to determine the beneficiary under a will. The Supreme Court held that even assuming that no such jurisdiction existed by reason of it being a matter of probate, yet, in a matter of probate, the Superior Court exercised its constitutional jurisdiction as a Court of general jurisdiction, and that a statute could not take away the power vested in the Superior Court by the constitution.

Counsel for the respondent have likewise erroneously assumed that the sole object of the bill in this suit was to have an alleged noncupative will annulled and

its probate revoked, and their argument is that as such relief can only be given by the Superior Court of the State in its exercise of probate jurisdiction, a Circuit Court of the United States in the State of Washington is without jurisdiction as a Federal Court.

A reference to the bill will show that the jurisdiction of the Circuit Court was invoked upon much broader ground than that assumed by counsel for respondent. The bill specifically alleged that under the law of the State of Washington, a nuncupative will, where the estate bequeathed exceeded the value of two hundred dollars, was invalid, and that even if valid, it could not convey real estate.

Bill, paragraphs 18-20. Record pages 15-16.

The bill set out the alleged nuncupative will, purporting on its fact to dispose of "Property and personal effects worth many thousands of dollars" and alleged that the real estate in Seattle of which the deceased died seized exceeded the value of three hundred thousand dollars.

Record, pages 12-13-15.

The bill also set out the petition of the respondent Carrau for the probate of the alleged will, in which she stated that:

"The testamentary words were thereafter reduced to writing which writing accompanies this petition * * * that the decedent was a bachelor and left no widow, heirs, or next of kin, so far as known to your petitioner; that the decedent left personal property of the value of fifty thousand dollars and real estate in said county of King, of the probable value of four hundred thousand dollars. Wherefore petitioner prays that said will be admitted to probate."

Record, page 13.

The bill specifically prayed:

"That the said pretended nuncupative will * * * be adjudged null and void and of no force and effect whatsoever, and in the event that said will should *not be adjudged null and void* the same should be adjudged *not to pass title to any real estate of the estate of John Sullivan, deceased*, nor any of the rents, issues and profits *issuing out of said real estate since the death of said John Sullivan, deceased.*"

Record, page 19.

The bill therefore states facts clearly showing, that, even assuming that the decree of probate rendered without jurisdiction and procured by fraud, conclusively established the execution of the alleged nuncupative will, still the title to the real estate of which the deceased died seized, passed upon his death to the petitioners, for the following reasons:

1st. Because the alleged will was invalid, in that it undertook to bequeath an estate exceeding in value two hundred dollars.

2nd. Because, if valid, it could not convey real estate.

The facts alleged in the bill therefore invoked the jurisdiction of the Circuit Court of the United States to construe the alleged will and determine, 1st, its validity, 2nd, if valid, whether or not real estate was conveyed by it.

There has never been any doubt that the construction of wills is a matter over which either a court of equity or a court of law has jurisdiction. There has never been any doubt that the construction of wills is not a matter of probate jurisdiction, although a Probate Court may by statute be vested with jurisdiction to construe wills.

The jurisdiction to construe a will was therefore a matter of which the Circuit Courts of the United States were by the constitution and laws of the United States vested with jurisdiction. A state statute expressly providing that a Probate Court should have sole and exclusive jurisdiction to construe wills could not deprive the Circuit Courts of the United States of the jurisdiction to construe wills vested in them by the constitution and laws of the United States.

The authorities upon this point are plain.

"It seems to be contended that after a will has been admitted to probate by the tribunal appointed for that purpose, its validity is no longer open to question, except by appeal from the decree of the court of probate, and hence that the court of common pleas has no jurisdiction to consider or determine the main question raised by this case, to-wit, whether Penelope Coghlan died intestate as to the Dougherty lot. This position cannot be sustained. The admission of a will to probate, either in common or solemn form, does not preclude inquiry into the validity of one or more of the provisions therein contained or of their proper construction or legal effect. It simply establishes the fact that a will has been made according to the form prescribed by the statute."

Burkett vs. Whittemore, 15 Southeastern Reporter, 616, 36S C. 428.

"The Probate court has the power, upon proper proceedings, to make a decree of distribution * * * but it has no power in this state to construe a will—to determine its effect upon the distribution of the estate—or to adjudicate between the heirs and the residuary legatees. Such power is given to Probate courts in some states, but in our system it is reserved to the law and equity courts * * *. In this case there is a question

whether the school district can take under the will, and whether, if they can take, they have not, by their action, rejected the legacy. This is a question between the school district and the heirs which can be determined only by the court of equity or law jurisdiction upon proper pleadings, notice and hearing. Not even the Supreme court of probate upon appeal can exercise the equity powers conferred upon the Supreme judicial court."

Hanscom vs. Marston, 19 Atlantic 460, 82 Me. 288.

"The legal effect of the will, or its various provisions, its construction and operation, do not come in question and cannot be passed upon on an application to admit the will to probate. The Probate court does not assume to determine the validity of a will, but only that the instrument presented for probate was executed as his last will and testament by the testator, in the manner prescribed by statute, and that he was legally competent to make a will."

Graham vs. Birch, 49 Northwestern 699, 47 Minn. 171.

"If the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution or valid under the law. Hence the probate does not establish the validity of any of its provisions. This is to be determined by the courts of construction when any question arises requiring their interposition."

1 Woerner Adm'n. Sec. 228, page 502.

"The power to determine directly and conclusively the construction to be given to wills is not committed to the court of probate, nor to the Superior court sitting as an appellate court of probate. Such a power involves the right to try and finally determine disputed titles to

property, real and personal, and this is not given to those courts."

In re Chapman's Estate, 39 Atlantic 734, 70 Conn. 363.

"In the second petition, the question presented to the Probate court was whether or not the property therein specified was, for the purpose of its distribution under the will, real estate or personal property, as under the terms of the will it was to be distributed differently, according to which of the above classes of property it belonged, but the determination of this question was also within the domain of equity jurisdiction. The inquiry whether or not this was to be deemed real estate or personal property, for the purpose of distribution, according to the provisions of the will, should be addressed to a court of chancery.

To authorize the Probate court, therefore, to entertain both or either of the foregoing petitions, required the possession by it of chancery powers. It must be a court of equity. Is it such a court? The answer to this question depends upon the proper construction of the law of congress, or what is generally known as the Organic Act instituting this court. The following is the provision of this Act, so far as it relates to the jurisdiction of the Probate court: 'The Probate courts of the Territory of Montana in their respective counties, in addition to their probate jurisdiction, are authorized to hear and determine civil causes * * * but they shall not have jurisdiction of any matter in controversy when the title or right to the peaceable possession of land may be in dispute, or of chancery or divorce cases * * *.' Another provision common to all the territories reads as follows: 'The Supreme court and the District courts respectively of every territory shall possess chancery as well as common law jurisdiction.' * * * By probate jurisdiction, in Section 1932, is meant the exercise of the ordinary power of what, *ex vi termini*, is generally understood to be the authority of courts of that name. They derive

their origin from the ecclesiastical courts of England, and this fact suggests the character of their powers. * * * Although they do not proceed according to the rules of the common law of England and this country, yet they are recognized by it and their jurisdiction is well defined and understood, as is that of our other courts of law and equity. Their powers are limited unless extended by statute, and are confined to the establishment of wills, the settlement and management, or, in other words, administration of decedents' estates, the supervising of the guardianship of infants, the control of their property, the allotment of dower, and other powers pertaining to the same general subject. This is the character of powers recognized by the term 'probate jurisdiction' as used in the foregoing Act of Congress. (Ferris vs. Higley, 20 Wall 375) * * * We think that the above provisions of the acts of congress, one of which expressly confers chancery jurisdiction upon the Supreme and District Courts, and the other of which prohibits its exercise by the Probate courts, leave no doubt as to where the only right to exercise such jurisdiction exists, namely, in the Supreme and District courts of the territory."

Chadwick vs. Chadwick, 13 Pacific 385, 6 Mont. 566.

"The next position of counsel for defendant is that the probate of the will is conclusive, and therefore the will itself must be regarded as valid until it, or the probate thereof, be set aside by proper proceedings. The premise of this proposition is correct, but the conclusion is not admissible. The probate of the will under the statute in force at the time had the effect to establish its execution and render it admissible as an instrument of evidence in the courts of the state and nothing more. (Code 1851, Sections 1297-1300.) It did not establish the testamentary character of the instrument and give validity to a title based upon it. The effect of the will and its interpretation whereon titles under it rested were not determined in the proceedings for its probate. These were

matters for adjudication when rights and property were claimed under the will."

Fallon vs. Chidester, 46 Ia. 588.

"It is clear that the Probate court was incompetent to grant the objects of the petition * * *. The court was asked, in effect, to determine the rights of the parties claiming under the will and not merely to determine whether it was an instrument made and published under such circumstances and with such legal forms as to constitute it the last will and testament of the testator and to entitle it to probate as such * * *. It obviously had no jurisdiction to declare that a will which was executed with all due legal solemnities was insufficient to pass title to parties to whom bequests were made in it. That was a question of construction of the contents of the will and not of the sufficiency of its execution and publication. The latter being established, it was not for that court to say whether any title passed to the parties claiming under its provisions."

Lusk vs. Lewis, 32 Miss. 297.

In *Ware vs. Wisner,* 50 Federal Reporter, 310, a bill in equity was brought to quiet the title of the complainants to certain land in Iowa. One Gage had acquired title to the land by patent. He made a will, leaving his property to certain of his children. After making his will another child was born to him. The question presented was the validity of the will. The opinion of the court was rendered by Judge McCrary, who said:

"My conclusions in this case are as follows: (1) The validty of the will under which the respondent claims title must be determined according to the laws of Iowa, where the land is situated * * * By the law of Iowa,

as interpreted by the Supreme court of the state, the will was revoked by the birth of an heir after it was executed * * *. The probate of the will in Iowa, while it settled the question of its due execution, does not conclusively establish its validity or determine its force and effect when title to real estate is claimed under it * * *. It follows that as to the land in controversy there is no valid will and the same is to be disposed of according to the Iowa law of descent."

The statute of Washington is very similar to the statute of Iowa:

"Every person who shall have attained the age of majority, of sound mind, may by last will divise all his or her estate, real and personal."

Pierce's Code, Sec. 2340.
Ballinger's Code, Sec. 4594.

"Every will shall be in writing, signed by the testator or testatrix or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

Pierce's Code, Sec. 2341.
Ballinger's Code, Sec. 4595.

"Every will proved according to the provisions of this chapter, recorded and certified by the judge of the Superior court and attested by the seal of said court, may be read as evidence without any further proof."

Pierce's Code, Sec. 2392.
Ballinger's Code, Sec. 6107.

"The record of any will made, proved and recorded as aforesaid, and the exemplification of such record by the clerk in whose custody the same may be, shall be received as evidence and shall be as effectual in all cases as the original would be if produced and proven."

Pierce's Code, Sec. 2393.
Ballinger's Code, Sec. 6108.

In the language of the Supreme court of Iowa, in Fallon vs. Chidester, 46 Iowa, 588-591:

"The probate of the will under the statute in force at the time had the effect to establish its execution and render it admissible as an instrument of evidence in the courts of the state and nothing more * * *. It did not establish the testamentary character of the instrument and give validity to a title based upon it. The effect of the will and its interpretation whereon titles under it rested were not determined in the proceedings for its probate."

The courts of the United States have repeatedly exercised their jurisdiction, either on the law side, or in equity, to construe wills and determine the rights of parties thereunder. If the construction of the will was presented to the court in an action of ejectment, then the law court would construe the will and determine whether the title of the deceased passed to his heir by operation of law or vested in the devisee claiming under the will. If the case presented to the court was one where there was no adequate remedy at law in the courts of the United States, then those courts would exercise jurisdiction in equity and construe the will.

Hardenbergh vs. Ray, 151 U. S. 112.
Potter vs. Couch, 141 U. S. 296.

Coulton vs. Coulton, 127 U. S. 300.
Jones vs. Habersham, 107 U. S. 174.
Sherman vs. American Congregational Association, 113 Federal 609.
Waterfield vs. Rice, 111 Federal 625.
Handly vs. Palmer, 103 Federal 39.
McDuffy vs. Montgomery, 128 Federal 105.

The construction of a will being a matter over which courts of equity and law both exercise jurisdiction, it was by the constitution of the state vested in the Superior court in the exercise of jurisdiction in equity and law. It was not vested in the Superior court by virtue of the grant to the Superior court of jurisdiction "in matters of probate." It is clear, therefore, that in determining the validity of the alleged will, and if valid, whether real estate passed under it, the suit, if petitioners had instituted one in the state court, would have been entertained by the state court under its jurisdiction over matters of law and equity, and not by the Superior court in the exercise of jurisdiction over matters of probate.

If, therefore, the respondent Carrau had been in possession of the property, and petitioners had instituted in the Circuit Court of the United States a suit in ejectment, the jurisdiction of the Circuit Court of the United States as a court of law would have been beyond question, and in that suit the Circuit Court of the United States would have had presented to it and have determined, the validity of the will, and if held valid, whether the title and right to possession of the real estate was in the petitioners as heirs at law of the deceased or whether it was in the respondent Carrau by reason of the will. The respondent Carrau, however, was not in possession of any of the property. An action of ejectment therefore could not be maintained against her, nor could a court of law afford the

petitioners any relief. The only test of whether a Circuit court of the United States has jurisdiction in equity, as distinguished from jurisdiction at law, depends on whether the remedy at law is as complete and adequate as that which can be afforded by a court of equity. If it is not, then the court has jurisdiction in equity.

Rich vs. Braxton, 158 U. S. 378.
Gormley vs. Clark, 134 U. S. 338.
Allen vs. Hanks, 136 U. S. 301-310.
Tyler vs. Savage, 143 U. S. 79-95.
Kilbourne vs. Sunderland, 130 U. S. 505-514.
Boyce's Executors vs. Grundy, 3 Peters 210-215.
Walla Walla vs. Walla Walla Water Company, 172 U. S. 1-12.
Bardon vs. Land Company, 157 U. S. 330.
Smyth vs. Ames, 169 U. S. 516.
Sheffield Furnace Co. vs. Witherow, 149 U. S. 574-579.
Hudson vs. Randolph, 66 Federal, 217.
Waite vs. O'Neil, 72 Federal 356.

In McConihay vs. Wright, 121 U. S. 201, a suit was brought in the Circuit Court of the United States in equity to quiet the title of complainant to a tract of land in West Virginia. The West Virginia code allowed an action of ejectment to be maintained against one claiming title to or an interest in land, although not in possession. The jurisdiction of the Circuit Court of the United States, in equity, was objected to on the ground that the complainant had a plain and adequate remedy at law under the West Virginia statute. This court, considering the objection, said:

"Admitting this to be so, it nevertheless cannot have the effect to oust the jurisdiction in equity of courts of the United States as previously established."

Where the statute of a state authorizes a suit to quiet title to be maintained by one not in possession of land against another claiming title to the land, who is also out of possession, a Circuit Court of the United States in equity has jurisdiction of a suit to quiet the title. The right given by the state statute will be enforced by the Circuit Court of the United States, and as the defendant is not in possession of the land, and therefore ejectment would not lie, the remedy is in equity.

Dick vs. Foraker, 155 U. S. 404.
Roberts vs. Northern Pacific Railroad, 158 U. S. 30.
Wehrman vs. Conklin, 155 U. S. 324.
Missouri, K. T. & T. Co. vs. Krumseig, 172 U. S. 351.
Holland vs. Challen, 110 U. S. 19.
Whitehead vs. Shattuck, 138 U. S. 146.
Frost vs. Spitley, 121 U. S. 552.
Moore vs. Steinbach, 127 U. S. 70.
Reynolds vs. Crawfordsville Bank, 112 U. S. 405-410.
Harding vs. Guice, 80 Federal 162.
Southern Pacific vs. Stanley, 49 Federal 263-265.

The statute of the state of Washington authorizes a suit to quiet title to real estate to be maintained by one not in possession of real estate against another also out of possession of real estate, but who asserts title thereto, even though the title asserted be void.

Kinsman vs. Spokane, 20 Wash. 119.
Rohrer vs. Snyder, 29 Wash, 199-203.
Jackson vs. Tatebo, 3 Wash. 456-462.
Bloomingdale vs. Weil, 29 Wash. 611, 634.

The respondent Carrau not being in possession of the real estate, but claiming title thereto under the nuncupa-

tive will and the decree of probate, could have been proceeded against by the petitioners by a suit in the state court to quiet their title to the land. It could not possibly be contended that the Superior court of the state, vested with complete equity jurisdiction, would have entertained such suit by virtue of the grant to it of jurisdiction over matters of probate. In such suit, the determination of the validity of the will would necessarily be drawn in question and, if it should be determined to be valid, then the question would be presented whether real estate passed under it. This question would be one of construction purely, a question committed to the jurisdiction of a court of equity, where the suit was one to quiet title.

If a court of the state of Washington, exercising either law or equity jurisdiction, would have the right to entertain jurisdiction of a suit instituted by the petitioners against the respondent Carrau to quiet their title to the real estate of which the deceased died seized, as against the claim asserted to that real estate under the will, then that the Circuit Court of the United States would have concurrent jurisdiction is beyond question. A state statute could not divest the Circuit Court of the United States of such jurisdiction, even if it expressly so provided.

In considering the question of the right of a Circuit Court of the United States, where the requisite diversity of citizenship existed, to entertain jurisdiction of a suit involving the validity or construction of a will, Mr. Justice Field, in delivering the opinion in the case of Gaines vs. Fuentes, 92 U. S. 10-22, said:

"Whenever a controversy in a suit between such parties arises, respecting the validity or construction of a

will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

The bill squarely presented to the Circuit court the question whether the alleged will, assuming its execution to have been conclusively established by the decree of probate, was valid, and also, if valid, whether real estate passed under it to the respondent. The requisite diversity of citizenship existed. The respondent was not in possession of the property. If the bill prayed for more relief than the petitioners were entitled to, namely, if though stating facts sufficient to give the Circuit Court of the United States jurisdiction to determine the validity and to construe the will, it did not state facts which authorized the Circuit court to determine the validity of the decree of probate, and whether the alleged will had been executed, then the Circuit court should have declined, in the exercise of its jurisdiction, to grant the full relief prayed for, but the fact that the petitioners prayed for greater relief than the Circuit court was authorized to give them, surely afforded no ground for the Circuit court to deny jurisdiction over the suit.

Prior to 1895 the Supreme court of the state of Washington held that on the death of a person intestate, seized of real estate, his heir could not maintain a suit to establish his title to the real estate, either prior to administration upon the estate, or during the pendency of administration. In 1895 the legislature enacted a statute which provided as follows:

"Section 1. When a person dies seized of lands, tenements or hereditaments, or any right thereto, or entitled

to any interest therein * * * his title shall vest immediately in his heirs * * *. No decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs * * *. But the same shall vest in the heirs * * * instantly upon the death of said decedent * * * the title and right to possession of such land * * * so vested in such heirs * * * together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs * * * excepting only the executor or administrator when appointed * * * and any one or more of such heirs * * * may sue for and recover their respective shares or interests in any such lands * * * and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not from any person except the executor or administrator."

Laws of Washington, 1895, page 197.

This statute came before the Supreme Court of Washington in the case of Griffin vs. Warburton, 23 Wash. 231, and the Supreme court construing the statute, said:

"Under the statute as it now exists, the heirs, upon the death of an ancestor, become vested at once with the full property * * * they have the right to possession against all the world except the right of the administrator."

"We have recently held that there is no necessity for a decree or order of distribution of a Probate court in order to pass title to the real property from the ancestor to the heir. That the rule as it formerly existed in this state, 'that the intervention of the Probate court and an adjudication and distribution thereunder are essential to the passing of the title of the ancestor to the heir, so perfected as to make it beneficial to him,' has been changed

by the Act of 1895. * * * It is expressly provided in that act not only that the estate vests in the heir instantly on the death of the ancestor, but that the heir may maintain an action, even if letters of administration have been granted, to recover his share or interest in the lands and the rents and profits thereof, against any person except the executor or administrator and those lawfully claiming under such executor or administrator."

Anrud vs. Scandinavian-American Bank, 27 Wash. 16-19.

The act of 1895 also provides that the title to real estate, if the deceased has left a will, shall vest in the devisee, but contains the following proviso: "Provided that no person shall be deemed a devisee until the will has been probated."

The title to the real estate of the deceased passed at his death instantly to his heirs, and the title to the personalty passed to the administrator, upon his qualification. Nearly six months after the death of the deceased, the respondent Carrau, by an *ex parte* proceeding, founded upon false testimony, obtained a decree, rendered without jurisdiction, probating the alleged nuncupative will, and thereafter claimed that that will passed the title of the entire estate to her. The statute above quoted expressly provided that no person should be deemed a devisee until the will was probated.

In the case of Basket vs. Hassell, 108 U. S. 267, the claim was set up that a certificate of deposit had been endorsed and delivered by a decedent to a person in such manner as to constitute it a good gift, *mortis causa*. This court held that it was not such a gift. A petition for rehearing was filed and the claim was made that if the transaction was not good as a gift, *mortis causa*, it

was nevertheless good as a will of personalty. This court answered that contention in the following language:

"But the conclusion is not justified by the assumption, for a will of personalty in Tennessee does not take effect until probated * * * and until probated and the appointment of an executor or administrator *cum testamento annexo*, the title to the fund passes to the administrator appointed previously, as in case of intestacy, to whom the decree in this case awarded it."

In the case at bar, the respondent Carrau sought to divest the petitioners, as heirs-at-law and next of kin of the deceased, of their title to the real estate, by virtue of the alleged will, and also sought to divest the administrator, previously appointed, of his title to the personalty. Whether she had done so or not was a question which the Circuit Court of the United States, sitting in equity, had a right to determine.

The decree of probate, though void, was fair on its face, and the Supreme Court of the State held, concerning this very estate, in the case of State, ex rel. Stratton vs. Tallman, 25 Wash. 295, that the decree of probate could not be set aside on motion, but that it could be set aside in a suit brought to contest the will, saying:

"The Superior Court entertaining such suit may fully protect such rights in the estate by such stay of proceedings in the procedure in probate as may be necessary or effective."

That a decree of probate, rendered without jurisdiction, obtained by fraud and founded upon false testimony,

can be inquired into by a Superior Court of the State, exercising jurisdiction either at law or in equity, is settled under the decisions of the State of Washington.

That the decree in the case at bar was void is settled by the authorities.

Smith v. White, 32 Wash. 474

Ball v. Clothier, 75 Pac. 1099, 34 Wash. —.
In re Leonard's Will, 65 N. J. L. 167.
Randolph vs. Bayne, 44 Cal. 370.
Charlebois vs. Bourdon, 6 Mont. 373.
Lewis vs. Bishop, 19 Wash. 312.
Northcut vs. Lemery, 8 Ore. 317, 323.
Hunsaker vs. Coffin, 2 Ore. 107.
Joiner vs. Delta Bank, 71 Miss. 382.
Fernekes vs. Case, 75 Ia. 152.
Melbourn vs. Fouts, 4 Ia. 346.
Hodges vs. Brett, 4 Ia. 345.
Sprole vs. Marshall, 4 Ia. 344.
Jones & Mayce Co. vs. Boggs, 63 Ia. 589.
Boales vs. Shules, 29 Ia. 507.
Haws vs. Clark, 37 Ia. 356.

The law governing nuncupative wills remains the same now as it was when Washington was a territory.

The legislature of the Territory of Washington, at its first session, held in the year 1854, enacted two statutes, one of which was entitled:

"An Act Establishing Probate Courts for the Territory of Washington."

Laws of 1854, Territory of Washington, page 309.

Another entitled

"An Act Relating to Wills."

Laws of 1854, page 312.

Section 23 of the latter Act provided:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, nor unless the same be proved by two witnesses * * *."

This law has never been changed by any act of the territory or of the state, legally enacted.

The organic act of the Territory of Washington (U. S. Statutes at Large, Vol. X, pages 172-174), by Section VI, provided that every law enacted by the territorial legislature "shall embrace but one object and that shall be expressed in the title." The territorial legislature, by an Act thereafter enacted and entitled "An Act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory" (Pierce's Code of Washington, page 358), re-enacted Section 23 of the Act of 1854 and dropped the word "nor" after the word "dollars" and before the word "unless" and thereby made the section read as follows:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars (nor) unless the same be proved by two witnesses * * *."

It is perfectly plain that a law entitled "An Act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory" could not, by the most liberal construction, be understood as repealing a limitation placed by law on the amount of an estate which might be bequeathed by nuncupative will, imposed by a section of an act entitled "An Act Relating to Wills." All statutes thereafter enacted by the legislature of the Territory of

Washington omitting the limitation upon estates which might be bequeathed by nuncupative wills, being entitled "An Act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory," were in conflict with the provisions of Section VI of the Organic Act and therefore void. Upon this point we respectfully refer the court to pages 26 to 32, both inclusive, of our opening brief upon the application for the writ of *certiorari*.

The Circuit Court of the United States certainly had power to determine whether an act of the territory of Washington, entitled "An Act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory" was void as being in conflict with Section VI of the Organic Act of the territory, in so far as it attempted to repeal a provision of a former act of the territory entitled "An Act Relating to Wills."

It is moreover clear that even if it should be assumed not only that the alleged will was valid, but that it was duly probated, it could not convey, under the laws of Washington, real estate.

There is no statute, either of the Territory or of the State of Washington, creating the right to make a nuncupative will. The question presented therefore is entirely different from what it would be if there were a statute of the state creating the right to dispose of an estate by nuncupative will. The law of Washington, from the earliest territorial days, adopted the common law. The statute adopting the common law is as follows:

"The common law, so far as it is not inconsistent with the constitution and laws of the United States or of the State of Washington, nor incompatible with the institutions and condition of society in this state, shall be the

rule of decision in all the courts of this state." (Pierce's Code, Sec. 249; Ballinger's Code, Sec. 4783.) Laws 1856, p. 7.

This same provision existed in territorial days. The territorial legislature, instead of creating the right to made a nuncupative will, recognized the right to make a nuncupative will as existing at common law, but saw fit to limit the amount of the estate which might be bequeathed, and to impose restrictions upon the execution and the proof of such wills. The language of the statute is not that a person shall have the right to dispose of his estate by nuncupative will. The language is "No nuncupative will shall be good when the estate *bequeathed* exceeds," etc. At common law, land could not be devised. The disability of the common law was partially removed by statute 32, Henry VIII. Prior to the statute of Henry VIII, personal property could be disposed of by a nuncupative will. Real estate could not be disposed of by any kind of will. The statute XXXII of Henry VIII, while allowing real estate to be devised, required the will to be in writing. Nuncupative wills remained as before the statute. The Statute of Charles II imposed stringent restrictions upon nuncupative wills. The Statute of Washington imposed additional restrictions upon nuncupative wills, and provided that nuncupative wills should not be good where the estate bequeathed exceeded two hundred dollars in value. That the legislature of the Territory, when imposing upon the right to make nuncupative wills greater restrictions than were imposed by the Statute of Charles II, intended to change the common law so that such wills could dispose of real estate, is a proposition to sustain which no possible reason can be assigned. The matter, however, is placed beyond all possible doubt, because the legislature, by Section 24 of the act, in dealing

with seamen at sea and soldiers in military service as a favored class, and while exempting them from the provisions of Section 23, expressly provided:

"Any mariner at sea or soldier in the military service may dispose of his wages or other personal property, as he might have done by the common law or by reducing the same to writing."

The contention of counsel for respondent that the legislature, by an act imposing greater restrictions upon the right to make nuncupative wills than were imposed by the Statute of Charles II, and while exempting mariners at sea and soldiers in the military service from its operation so far as wages and personal property were concerned, conferred upon the unfavored class the power to devise real estate, by declaring "No nuncupative will shall be good when the estate *bequeathed* shall exceed," etc., is manifestly unsound. Not only, however, did the legislature in the section of the act relating to nuncupative wills use the word "bequeathed," but in the sections of the act not relating to nuncupative wills, whenever dealing with the subject of lands passing by will, used the word "devise." Unless the object of language is to conceal instead of express thought, the legislature, in dealing with bequests under nuncupative wills, referred to personal property, for, when it dealt with wills relating to lands, it advisedly used the word "devise." From the language of the statute alone the matter is not even open to doubt, but in the light of the authorities there is no room for controversy.

That a nuncupative will cannot convey real estate is conclusively settled by an unbroken line of authorities. line of authorities.

In the case of

In re Davis Will, 79 N. W. 761 (103 Wis. 455)

the Supreme Court of Wisconsin had before it for construction a nuncupative will in the following language:

"I give unto my wife the income of my entire estate during her widowhood. If she shall remarry, she is to have one-third of my estate, and the other two-thirds is to go to my children. Upon the death of my wife, my whole estate is then to go to my children. I appoint my brother Oscar F. Davis my executor."

The Court said:

"The only question for consideration is whether the words so spoken, and constituting the nuncupative will of the deceased, were effectual to pass the income of the real estate to the widow. * * * All wills, except nuncupative wills, must be in writing, and executed as prescribed. * * * And the statute further declares that 'no nuncupative will shall be good when the estate bequeathed shall exceed the value of $150 that is not proved,' as therein prescribed. * * * The word 'bequeathed' is commonly used with reference to the disposition of personal property; and the word 'devise' with reference to the disposition of real property.* * * We must hold that under our statutes a nuncupative will is inoperative to transfer title to real estate. This is in accordance with the rulings of other courts under similar statutes."

To the same effect are the following authorities:

Sadler v. Sadler, 60 Miss. 251.
McLeod v. Dell, 9 Fla. 451.

Smithdeal v. Smith, 64 N. C. 52.
Palmer v. Palmer, 2 Dana 390.
Page v. Page, 2 Rob. (Va.) 424.
Lewis v. Aylott, 45 Tex. 190.
Pierce v. Pierce, 46 Ind. 86.
Schouler on the Law of Wills, Sec. 362.
Moffett v. Moffett, 67 Texas 642.

II.

It is contended by Counsel for the respondent Marie Carrau that the Circuit Court of the United States had no jurisdiction as a federal court because it appeared that one Eugene Timothy Sullivan claimed to be the sole heir of the deceased John Sullivan; that Eugene Timothy Sullivan was a citizen of the State of Washington and Marie Carrau was a citizen of the State of Washington; that Eugene Timothy Sullivan was an indispensable party to this suit and that if made a party he would be a party plaintiff, and therefore the suit would have a citizen of the State of Washington as party plaintiff and a citizen of the State of Washington as party defendant, and such joinder would oust the Circuit Court of jurisdiction.

The contention, in view of the pleadings and the record in this suit, is certainly novel.

The bill in this suit was filed on the 20th of June, 1901. The parties to that bill were the petitioners, as complainants, who were subjects of the King of Great Britain and Ireland. The defendants were two citizens of the United States and of the State of Washington. The jurisdiction of the Circuit Court of the United States attached on that date. Eugene Timothy Sullivan filed no claim until the 23rd day of August, 1901. (See Carrau's Plea in Abatement, record pages 35 and 36.)

The proposition is elementary that if the jurisdiction of the Circuit Court has attached it will not be divested by reason of a transfer of interest to a person who could not have originally instituted the suit in the Circuit Court. It is also elementary that a person not possessing the requisite citizenship cannot oust the Circuit Court of its jurisdiction, which previously attached, by intervening in the suit.

Hardenberg vs. Ray, 151 U. S. 112.

Therefore, so far as Eugene Timothy Sullivan is concerned, if the Circuit Court of the United States acquired jurisdiction of this suit on the 20th day of June, 1901, it could not be divested of that jurisdiction by Eugene Timothy Sullivan filing a claim as heir of the deceased in the Superior Court of the State of Washington. It might just as well be claimed that if Marie Carrau had been in possession of the real estate and the petitioners had instituted an action of ejectment against her in the Circuit Court of the United States, Eugene Timonthy Sullivan could have ousted the Circuit Court of jurisdiction by instituting an action of ejectment against her in the state court. If, however, it should be claimed that there were other persons, aliens, who also claimed to be heirs of the deceased and that those persons could not be joined as defendants without ousting the Circuit Court of jurisdiction, it is a sufficient answer that those persons were not within the jurisdiction of the Circuit Court and that they were not indispensable parties, and furthermore that the petitioners and respondent both claim that they have no interest in the estate.

By a reference to the pleadings it will be found that the respondent Carrau admitted that there were no persons nearer of kin to the deceased than first cousins. If,

therefore, the petitioners established that they were first cousins of the deceased, they were entitled to recover their shares in the estate. The admission of the respondent Marie Carrau appears at page 65 of the record. An examination of the answer of Marie Carrau will, however, fail to disclose that she pleaded a non-joinder of either necessary or proper parties. She did not allege that the deceased left any heirs. She merely pleaded that certain persons had *filed* claims in the state court. If a suit in ejectment had been instituted against her it certainly could not be contended that she could defeat the jurisdiction of the Circuit Court of the United States by showing that persons, whose citizenship would have deprived the Circuit Court of the United States of jurisdiction if made parties, had instituted ejectment suits against her in the state court. Not only, however, did she not plead that there was a non-joinder of indispensable parties, but she endeavored to prove that complainants were not relatives of the deceased, because she claimed that the deceased left no relatives. Her claim, therefore, is that because certain persons had filed claims in the state court alleging that they were the only heirs of the deceased, and that both the petitioners and herself contended that the persons filing such claims had no interest in the estate, the fact of the filing of the claims divested the Circuit Court of jurisdiction to determine the controversy before it where the parties on one side were aliens and on the other citizens of the United States.

It is certainly a novel proposition that a person whom all parties to a suit say has no interest in the property, is such an indispensable party to a suit to determine the title to that property that no decree can be rendered in the suit without his joinder, and yet if joined his joinder will divest the court of jurisdiction as between parties

claiming the property between whom the requisite diversity of citizenship does exist.

The bill disclosed a case within the jurisdiction of the Circuit Court of the United States because it showed a controversy over property having the money value required by law, and that the parties to the suit possessed the requisite diversity of citizenship.

If it was the intention of Marie Carrau to divest the Circuit Court of the United States of the jurisdiction which had attached, by showing that parties, whose citizenship, if such parties were joined, would oust the Circuit Court of jurisdiction, were indispensable parties, it was incumbent upon her not only to plead that fact but to prove it.

To her answer the petitioners filed a general replication. Evidence was taken in the suit. The petitioners offered evidence which proved that they were the only first cousins, heirs at law and next of kin of the deceased. The respondent Carrau admitted by her answer that there were no persons nearer of kin to the deceased than first cousins. She introduced evidence for the purpose of establishing that the petitioners were not related to the deceased because he died without relatives. We submit, therefore, that there is no foundation for the claim that there were any persons who should have been joined as parties other than those who were before the court.

The authorities sustain the proposition that all of the necessary parties to the suit were before the court:

Authorities, pp. 36-38 of Opening Brief.

CONCLUSION.

Finally, we confidently submit that at this day there is no reasonable doubt of the soundness of the following propositions:

1. That where the amount involved is sufficient for jurisdictional purposes and the requisite diversity of citizenship exists, a Circuit Court of the United States has jurisdiction in equity to enjoin one from asserting and enforcing a decree of a State Court obtained by fraud and rendered without jurisdiction, where there is no adequate remedy at law.

Howard vs. Cordova, 177 U. S. 609.
Cooper vs. Newell, 173 U. S. 155.
Huntington vs. Laidley, 176 U. S. 668.
Marshall vs. Holmes, 141 U. S. 590.
Arrowsmith vs. Gleason, 129 U. S. 86.
National Surety Co. vs. State Bank, 120 Fed. 593 (C. C. A., 8th Cir.)
McNeil vs. McNeil, 78 Fed. 834.
Gravet vs. Faurot, 76 Fed. 257.

2. That while the probate of a will *ex parte* is a proceeding *in rem* over which a Circuit Court of the United States does not exercise jurisdiction, yet when a State Court of general jurisdiction has jurisdiction by a proceeding *inter partes* to annul a will and its probate, a Circuit Court of the United States in such State has jurisdiction at law or in equity, as the nature of the case may require, to give the same relief, when the amount involved is sufficient and the requisite diversity of citizenship exists.

Richardson vs. Green, 159 U. S. 264.
Richardson vs. Green, 61 Fed. 423.

Crabbe vs. Williams, 187 U. S. 645.
Williams vs. Crabbe, 117 Fed. 193.
Wart vs. Wart, 117 Fed. 766.
Sawyer vs. White, 122 Fed.223.
Kieley vs. McGlynn (Broderick's Will), 21 Wall. 503.
Ellis vs. Davis, 109 U. S. 485.
Gaines vs. Fuentes, 92 U. S. 10.
Byers vs. McAuley, 149 U. S. 608.
McDonald vs. Jordan, 178 U. S. 229.
Everhart vs. Everhart, 34 Fed. 82.
Broadhead vs. Shoemaker, 44 Fed. 518.
Kirby vs. Railroad Co., 106 Fed. 551.

3. The Statute of Washington having given an equitable right to the heirs of a decedent to contest the will in a Superior Court of the State, exercising general equity jurisdiction, by a proceeding *inter partes*, and the Supreme Court of the State having decided that the suit to enforce such right is of an equitable nature, the Circuit Court of the United States for the District of Washington has jurisdiction to enforce the same right in this suit.

Clayson vs. Clayson, 26 Wash. 253.
State, ex rel. Stratton, vs. Tallman, 25 Wash. 295.
Higgins vs. Nethery, 30 Wash. 239.
Bower vs. Bower, 5 Wash. 225.
Mason vs. McLean, 6 Wash. 31.
Hill vs. Hill, 7 Wash. 408.
Purdy vs. Purdy, 13 Wash. 164.
Boman vs. Boman, 49 Fed. 329.
See authorities cited under last proposition, also authorities cited on pages 13, 14 and 15 of principal brief on application for *certiorari*.

Land Title Co. vs. Asphalt Co., 127 Fed. 1. (C. C. A., Third Cir.)

U. S. Ship Building Co. vs. Conklin et al., 126 Fed. 132. (C. C. A., Third Cir.)

Jones vs. Mutual Fidelity Co., 123 Fed. 506.

The Circuit Court of Appeals in this case denied these petitioners a decision in that court on the merits of the case for the sole reason that, in the opinion of the Circuit Court of Appeals, the Circuit Court of the United States had no jurisdiction, as a federal court, to entertain the suit.

In

U. S. vs. Jahn, 155 U. S. 109, this court said:

"It is conceded that the United States assigned errors on the merits as well as the error under consideration, and as the question of jurisdiction lay at the threshold, *and the intent of the act of March* 3, 1891, *was that that question should be determined by this court*, the Circuit Court of Appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate."

The Circuit Court found that the alleged nuncupative will had never been made. It found that the parties claiming under it had sworn falsely when they obtained the order probating it. It found that the decree of probate was founded upon a citation issued at half past eleven o'clock on the 8th day of March, 1901, which required the heirs and next of kin of the deceased to appear at ten o'clock of the same day, an hour which had already passed at the time the citation was issued. It found that the citation was placed in the hands of the sheriff for service, and that he immediately returned it, stating that he could find no heirs or next of kin. It found that

the testimony of the witnesses, the claimant under the will and her sisters and brother-in-law, was immediately taken; that it had been written out in advance, and that the court immediately admitted the will to probate. It found that the petitioners were heirs at law and next of kin of the deceased, and held that they could not be disinherited of the property of which the deceased died seized, by any such proceeding.

It appears from the bill that the respondent Carrau was endeavoring to use this unconscionable decree of probate, founded upon fraud and rendered without jurisdiction, to obtain delivery to her of the entire estate. The bill charged that she was insolvent; that the estate was about to be delivered to her; that she would dispose of it, and that the petitioners would be compelled to resort to a multiplicity of suits. The bill charged that the delivery of the property to her, and the establishment of her status as a devisee under the will by the decree of probate rendered in the manner above set forth, would deprive the petitioners of their property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

Certainly a court of equity was called upon to exercise its jurisdiction on this state of facts. The bill stated a matter within the jurisdiction of the Circuit Court of the United States as a federal court. The jurisdiction was exercised. The Circuit Court of Appeals, under what we most respectfully submit was a misapprehension of the law, held that the Circuit Court, as a federal court, was without jurisdiction, and directed the dismissal of the bill. The facts of the case certainly call upon this court to give relief. The law of the case, being as announced in U. S. vs. Jahn, 155 U. S. 109, that where

"the question of jurisdiction lay at the threshold (and) *the intent of the Act of March* 3, 1891, *was that that question should be determined by this court,"*

entitles these petitioners to the writ of *certiorari*, to have that question reviewed and determined here, if it should be held that an appeal does not lie from the decree of the Circuit Court of Appeals to this Court as a matter of right.

Respectfully submitted,

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